1966

Henry Bawden, et al. v. Othello P. Pearce, et al. v. Doxey-Layton Co., et al. : Brief of Doxey-Layton Co., Et Al, Intervenors and Respondents

In the Supreme Court of the State of Utah

HENRY BAWDEN, et al.,
Plaintiffs and Appellants,

—vs—

OTHELLO P. PEARCE, et al.,
Defendants and Respondents.

—vs—

DOXEY-LAYTON CO., et al.,
Intervenors and Respondents.

Case No.
10459

BRIEF OF DOXEY-LAYTON CO., et al, INTERVENORS AND RESPONDENTS

SKEEN, WORSLEY, SNOW
and CHRISTENSEN
Wood R. Worsley and
Joseph J. Palmer
701 Continental Bank Building
Salt Lake City, Utah
Attorneys for Intervenors
and Respondents

McKAY & BURTON
Macoy A. McMurray and
Barrie G. McKay
720 Newhouse Building
Salt Lake City, Utah
Attorneys for Plaintiffs
and Appellants
Ollie McCulloch
City and County Building
Salt Lake City, Utah
Attorney for Defendants and
Respondents

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The parties will be referred to as in trial court.

NATURE OF THE CASE

In this action, plaintiffs 35-40, Inc. and six other owners of property in the Hunter-Granger Planning District in Salt Lake County, Utah, seek an injunction to restrain the Director of the Building Inspection Department of Salt Lake County, the Salt Lake County Commission and its members, and the Salt Lake County Planning Commission and its members, defendants, from issuing *further* building permits to intervenors, who are

owners and developers of a commercial shopping center at 3500 South and 2700 West, Salt Lake City, Utah. Appellants claim issuance of such additional building permits, a permit having been issued at the time of filing of complaint, would violate applicable zoning ordinances, but in so doing they overlook a prior final judgment and writ of mandate issued in *American Housing Corporation, et al, v. Persyl L. Richardson, et al,* District Court of Salt Lake County, Civil No. 152766, specifically directing such officials to process permit applications for buildings on the property of the shopping center of intervenors, and the fact that the injunction would restrain county officials from the performances of acts which they are directed to perform under said judgment and writ.

DISPOSITION IN LOWER COURT

The Third Judicial District Court in and for Salt Lake County, Utah, Judge Aldon J. Anderson, granted intervenors' application to intervene and their motion to dismiss the complaint, and denied an oral motion for summary judgment made near the conclusion of the hearing by plaintiffs. Certain factual stipulations had been made prior to the granting of such motion, and there had been received in evidence the entire proceedings in two cases in said District Court, *American Housing Corporation, et al,* supra and *Ivan Woodbury, et al v. Dorey-Layton Construction Company,* et al, Civil Case No. 158023.

STATEMENT OF FACTS

The statement of facts of plaintiffs is taken from their complaint herein, which is in turn in large measure derived from the findings and judgment of the District Court in the *American Housing* case. The single relevant fact in the narration of such proceedings is said judgment, which in now final, an appeal to this Court having been dismissed. However, since plaintiffs have attempted to detail the matter, and in doing so have demonstrated by their recital that the instant proceedings constitute a collateral attack on and appeal of such proceedings, or an entire retrial of the issues of the case, certain additions to appellants' statement are indicated in the interest of accuracy.

Plaintiffs and intervenors are each developing competing regional shopping centers in the Hunter-Granger Planning District of Salt Lake City, Utah, appellants at 3500 South and 2700 West and intervenors at 3500 South and 4000 West (appellants' brief, p. 4, 5). Prior to December 18, 1963, no zoning regulations for the Hunter-Granger Planning District had been adopted (R-155). Intervenors in 1961 had obtained a building permit for a shopping center on their land, but it lapsed (R-157, 158). Pursuant to 17-27-19, U.C.A. 1953, the board of county commissioners, pending completion of a master zoning plan, may temporarily prohibit or regulate land useage "for a limited period only and in any event not to exceed

six months." On December 18, 1963, the Board of Commissioners of Salt Lake County adopted a six-month temporary freeze ordinance pursuant to that statute (R-155.) On May 2, 1964, intervenors again applied for a permit to build an entire shopping center on their specifically described ground (R-158), but the Salt Lake County Planning Commission (R-159) denied the application on May 23, 1964 (R-159). On June 19, 1964, Salt Lake County enacted another identical ordinance purporting to extend the prior ordinance an additional six months (R-156). On June 30, 1964, intervenors appealed to the Board of Commissioners of Salt Lake County for a permit, and on September 30, 1964, the Board denied the application, apparently under authority of the ordinance of June 19, 1964 (R-159).

Intervenors then commenced action against the Building Inspector and County Commissioners, in the District Court of Salt Lake County, *American Housing Corporation, et al, plaintiffs, v. Richardson, et al, defendants,* Civil No. 152766, seeking a writ of mandate to compel the Building Inspector to process intervenors' application for "building permits for buildings to be constructed on its specifically described real property without reference to the use of the buildings and land as a regional shopping center from the standpoint of zoning" (R-161, 167). While that action was pending, Salt Lake County adopted a zoning ordinance effective February 12, 1965, which zoned intervenors' land as resi-

denial and appellants land to permit construction of a shopping center (appellant's brief, p. 5). On February 25, 1965, the District Court of Salt Lake County, Judge Ferdinand Erickson, made and entered its Findings of Fact and Conclusions of Law in the *American Housing* case, determining that the county ordinance of June 19, 1964, purporting to extend the freeze ordinance an additional six months, was void as beyond the jurisdiction of the County Commission and beyond the powers granted the Board by statute, that at the time of the final denial of intervenors' application for building permit on September 30, 1964, there was no zoning ordinance or regulation in force as to intervenors' land, that the denial of their application for building permit to use their land as a regional shopping center was unlawful and that a writ of mandate should be issued requiring the defendant Building Inspector, Salt Lake County Planning Commission, and the Salt Lake County Commission to consider and process intervenors' application for "building permits for buildings without reference to the use of the buildings and land as a regional shopping center." (R. 160, 161).

The language of Judge Erickson's Finding Number 17 in the *American Housing* case is:

> "17. That as set forth above, it was the duty of the Planning Commission of Salt Lake County, its members, and its staff, the Chief Building Inspector of Salt Lake County and his staff, to im-

> mediately entertain and *fully process said application without reference to the intended use of the buildings* to be erected on said real property, as a regional shopping center, and of the Salt Lake County Board of Commissioners to direct said other respondents to do so. That all of said respondents refused to perform their said obligations and duties as required by law." (R-159, 160). (Emphasis added).

The Judgment (R-163, 164) directed the various officials to,

> "consistent with the duties of their respective offices, and by direction as appropriate to Commission personnel as to whom there is power of direction, *to consider and process the application of Doxey-Layton Company, for itself and other landowners, for building permits for buildings to be constructed* within and upon the real property located in Salt Lake County, Utah, more particularly hereinafter described, with reasonable expedition and without consideration of the land and building usage from the standpoint of zoning, and particularly without reference to use of said buildings and land as a regional shopping center."

Judge Erickson also found in Finding 9 (R-156) that the procedure for obtaining building permits in Salt Lake County is that as a first step, an application is filed with the Planning Commission which consists of a description of the entire area of the real property to be used, a plot plan and other pertinent information, to enable the Planning Commission to determine whether the intended use

of the land and contemplated buildings conforms with applicable zoning ordinances. If rejected for conflict with the zoning ordinances, no other documents are filed and no processing relative to issuance of a building permit occurs. If approved for zoning, the application is, as a second step, referred to the Building Inspector, to whom the applicable presents detailed plans and specifications of the buildings and structures. The application is thereupon processed and determination made for conformity of building construction and design to building construction codes and regulations, the action of the Building Inspector being essentially ministerial in nature. If in conformity, a building permit is then issued by the Building Inspector (R-156, 157).

The Writ was issued (R-166), and defendant county officials appealed Judge Erickson's decision to this Court (R-6). Pursuant to the Writ, the county officials issued clearance of the entire property from a zoning standpoint, and the Building Inspector processed an application of intervenors and issued a building permit on June 17, 1965 (Ex. P-4). The building permit states on its face it is for a "shopping center" and "footings and foundations only for Building C."

Based upon the issuance of the permit for construction of only the footings for one building, which meant that step one, zoning clearance, was now forever passed, intervenors filed with this Court a motion to dismiss the

appeal of defendant county officials in the *American Housing* case, *supra,* upon the grounds that the appeal was moot. A supporting affidavit was filed which attached an exact copy of the building permit, Exhibit P-4, which clearly showed that the permit covered "footings and foundations only for Building C."

The land usage of the entire shopping center area from a zoning standpoint was the heart of the controversy. Clearance from this standpoint had been denied prior to the judgment, and the application for permit for this reason had not been considered or processed in any way. The memorandum in support of motion to dismiss the *American Housing* case urged in essence that when the county officials issued a building permit, the action constituted proof that zoning clearance for the shopping center had been issued in conformity with the judgment and writ of mandate. Hence, all controversy was then eliminated. Authority was cited for the proposition that the appeal was moot, set forth in the memorandum in Exhibit P-1.

On August 2, 1965, on stipulation of counsel for all parties, the Supreme Court entered its order dismissing the *American Housing* appeal.

Appellants did not intervene in the *American Housing* case. However, as plaintiffs' counsel argued to the trial court in this case:

> "They (plaintiffs) did not intervene at that proceeding (*American Housing*). The County Attorney's office on behalf of the County officers and agencies involved, proceeded with that appeal *and the plaintiffs in the instant case that is now before the Court watched with anxiety the outcome of that decision.* We are aware of all that has transpired and we are concerned about it." (R-134) (Parenthesis and emphasis added).

The complaint herein asserts that since an area in the Hunter-Granger Zoning District is zoned Residential R-2, in which the lands of intervenors are located, and one building permit was issued to intervenors for footings for Building C, no further permits or building authorizations should be issued and an injunction should now be granted in effect prohibiting the county officials from compliance with the writ of mandate in the *American Housing* case. This overlooks the wording of the judgment quoted above, and the resolution of the controversy. The complaint does not plead all elements of estoppel, or raise such issue by its terms.

ARGUMENT

POINT I

PLAINTIFFS ARE NOT ENTITLED TO MAINTAIN THIS ACTION, THE LAND USAGE OF THE INTERVENORS' SHOPPING CENTER AREA HAS BEEN FINALLY DETERMINED BY THE DISTRICT COURT JUDGMENT IN THE AMERICAN HOUSING CASE.

SUPRA, AND SUCH JUDGMENT CANNOT BE COLLATERALLY ATTACKED OR RELITIGATED IN THESE PROCEEDINGS.

Under Point I of plaintiffs' brief, they argue that as holders of real property within the Hunter-Granger Planning District, they are entitled by the provisions of 17-27-23, U.C.A. 1953, to bring this action to enjoin the Chief Building Inspector from issuing any building permits contrary to a zoning ordinance. Such section simply provides that if there is a violation of the zoning ordinances, an owner of the district in which the violation occurs may bring an action to stop such violation. Presumably, after the Court determines that there has been a use contrary to law, it will take steps to prevent such use. The statute has no relevancy under the facts of this case.

The effective date of the Hunter-Granger Planning District zoning ordinance was February 12, 1965. The judgment of Judge Erickson in the *American Housing* case was entered on February 24, 1965, subsequent to and with knowledge of the action of the County Commission in enacting zoning regulations. After entry of judgment in that case, a further order was entered on June 1, 1965, (R-172) making substitution of and addition to county officials to whom the mandate was directed, and an order to show cause and decree thereon (R-169) was issued on July 12, 1965, relative to failure of com-

pliance. Neither changed the judgment of February 24, 1965, and writ, except as to addition and substitution of parties.

The Hunter- Granger Zoning District defines a broad area of land as Residential R-2, and included within it is the relatively small parcel which was described in and affected by the judgment. There was in fact no zoning classification which dealt exclusively with use of land as a shopping center. The judgment simply recognizes that a shopping center could be erected on the involved property, and is in essence a judgment in rem since it directly affects the status of property. As will be hereinafter noted, the judgment is binding upon other land owners in the district.

The plaintiffs then assert in their brief, page 10, that the judgment is now "without merit by reason of the subsequent order of the Supreme Court of Utah" which finds that the Building Inspector, et al, have complied with the writ of mandate and the matter is moot. Exhibit P-2 is cited as the authority for such statement. This Exhibit is the order of the Supreme Court dismissing the appeal in the *American Housing* case, Supreme Court Case No. 10248, upon stipulation of the defendant county officials through their counsel. It is not in any sense of the word a finding of the Supreme Court, although this is immaterial in any event since there is no indication, directly or indirectly, that this judgment, essentially in

rem, is to be declared void. The entire record indicates the contrary.

The brief then asserts, page 11, that by virtue of such non-existent determination by the Supreme Court, the judgment is meaningless. It cites the case of *Christie v. Morris,* 119 Mont. 383, 176 P.2d 660, 663 (1947) in support of its contention. This case has no factual relevancy to the instant proceeding, but does contain general language, based upon citations from C.J.S. and Am. Jur., to the effect that

> ". . . no one, whether or not a party to the proceeding in which they (court records of a judgment) were made, may in a collateral proceeding impeach them by adducing evidence in denial of facts of which they purport to be a memorial."

The rule is persuasive, and simply holds that a collateral attack may not be made on a judgment, which is precisely what the plaintiffs are attempting to do in these proceedings. The simple fact remains that the Supreme Court has made no judicial findings, and that the judgment of Judge Erickson in the *American Housing* case is controlling.

Plaintiffs admit they are bound by the judgment in the *American Housing* case when they recognize the validity of the issuance of the building permit, Exhibit P-4. This relates to the foundations of one building

of the complex, and plaintiffs here seek to prevent any further construction. It must again be noted that this judgment did not direct issuance of permits as such, but rather the orderly processing of applications for construction permits for buildings of a regional shopping center without reference to zoning classification.

Plaintiffs claim no proprietory interest in the lands here involved, and since the action was against and defended by the appropriate county officials, land owners in the district such as plaintiffs are bound by said judgment.

As stated in C.J.S.:

> "When the court has jurisdiction of the parties and the subject matter of the litigation in a mandamus proceeding, its judgment therein rendered may not be attacked collaterally, in the absence of fraud or collusion." 55 C.J.S. Mandamus, §340(h).
>
> "A peremptory writ of mandamus operates as a final judgment, and is res judicata of the rights of the parties at the time it is issued, and is not subject to collateral attack. All matters of law and fact that could have been pleaded in defense prior to the award of a peremptory writ are foreclosed thereby." 55 C.J.S. Mandamus, §355.
>
> "The principal of estoppel or bar by judgment is in no way dependent upon the form or the object of the litigation in which the adjudication was made; it is only essential that there should have been a judicial determination of rights in controversy with a final decision thereon.

"It is well settled that a final judgment rendered on the merits of an application for a peremptory writ of mandamus comes within the principle of res judicata, and is a bar to another application for the same writ by the same party under the same circumstances, or to another action involving the same issues or in which the same relief is sought, provided the decision proceeds on the merits . . ." 50 C.J.S., Judgments §608. (See the *Price, Cohn.* and *Servente* cases, *infra.*)

"In the absence of fraud or collusion, a judgment for or against a governmental body, such as a municipal corporation, county, town, school or irrigation district, or other local governmental agency or district, or a board of officers properly representing it, is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest, such as questions relating to public property, contracts or other obligations. The rule is frequently applied to judgments rendered in an action between certain residents or taxpayers and a state, municipality, county or district, or board or officer representing it, it being held that all other citizens and taxpayers similarly situated are represented in the litigation and bound by the judgment, in the absence of fraud or collusion. The rule is applicable to persons who have notice of the suit, and even to persons without actual notice of the pendency of the suit." 50 C.J.S. Judgments §796(b).

In *Price v. Sixth District Agricultural Association*, 201 Cal. 502, 258 Pac. 387 (1927), prior mandamus proceedings had upheld the validity of the lease of a coliseum

proposed by the city, and had ordered execution of the lease by the city. Subsequent to that decision, the lease was redrafted, executed, and an action commenced by plaintiff citizens to enjoin the city from constructing the coliseum. The Court held the prior action was res judicata:

> "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jjurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court, or in another court of concurrent jurisdiction, upon the same or a different cause of action." (p. 390).

The Court considered whether or not the parties were the same, and said:

> "The fact that there are defendants and respondents other than the city and county does not prevent the application of the rule that the parties are deemed to be the same." (p. 391).

After citing with approval 50 C.J.S. Judgments 796(b), the Court stated, page 392:

> ". . . If, however, fraud and collusion be absent, the public interest may be as well represented by

> the mayor or chairman of the board of supervisors as by any set of taxpayers. . . . This doctrine is not impaired because the former suits were judgments in mandamus proceedings so long as the judgments were on the merits."

The Court also cited numerous authorities and, with approval, the following:

> ". . . If the judgment in mandamus was not as effectual, upon the principal of res a j u d i c a t a, against the inhabitants of the county as it is against the county commissioners, *there would be no end to litigation in such cases or in any case against county officials as such.*"

In *Berman v. Denver Tramway Corporation,* 197 F. 2d 946 (C.A. 10th, 1952), the federal district court in creditor's bill against a company transporting passengers in Denver, entered a decree restraining the City and County of Denver from enforcing ordinances limiting amounts of fares. Such decree was affirmed and held binding on members of the public although they were not parties to the suit. At page 951, the Court said:

> ". . . where a municipality is vested with power to establish or enforce fares of that kind, a valid judgment or decree of a court of competent jurisdiction in an action by or against the municipality determining the validity and amount of such fares is binding upon the public."

In *Servente v. Murray,* 10 Cal. App. 2d 335, 52 P. 2d 270 (1936), the Pension Board's appearance in a prior mandamus proceeding against the issuance of a pension to a former policeman was held to bind the public.

McNichols v. City and County of Denver, 101 Colo. 316, 74 P. 2d 99 (1937), involved an action by the auditor against the City and County. Judgment for defendant was affirmed. The Court said:

> "We are definitely of the opinion that where such a suit, designed to test the validity of a bond issue, is brought by a public official charged with ministerial and executive duties in connection therewith, in which proceedings the political subdivision proposing the issuance of the bonds as a body politic and corporate and its elected and appointed officials who have duties to perform in connection with the issuance of such bonds, are joined as here, that a judgment rendered therein is res judicata as to the validity of the bonds against all persons, including taxpayers, even though they are not parties to the suit. To hold otherwise would, to a great extent, render nugatory to all intents and purposes the Declaratory Judgments Law. The reason for such a rule is well stated in 1 Freeman on Judgments (5th Ed.) p. 1090, where it is said:
>
> > 'The position of such a governmental body towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his cestui que trust, when they are numerous and the management and control

> of their interests are by the terms of the trust committeed to his care. A judgment against it or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit'." (p. 102)

The public was held bound in actions against governmental officials in the following cases relative to matters indicated: *State, ex rel. Hamilton v. Cohn*, 1 Wyo. 2d 54, 95 P. 2d 38 (1939), (taxation); *Atchison, T. & S.F. R. Co. v. Board of Commissioners*, 95 Colo. 435, 37 P. 2d 761 (1934), (school taxes).

In *Vessels v. Davidson Chevrolet, Inc.*, 144 Colo. 101, 355 P.2d 121 (1960), a land owner brought action to require a zoning administrator and building inspector of Denver to enforce a zoning ordinance and to enjoin Davidson Chevrolet, Inc. from erecting structures on a particular parcel of land after the Court by final judgment in a prior action had authorized the building permits. The Court held the prior judgment could not be collaterally attacked and sustained granting of defendant's motion for summary judgment dismissing plaintiff's complaint saying:

> "Davidson Chevrolet, Inc., and the Slocums moved to dismiss plaintiff's complaint and for a summary judgment. This motion was sustained by the trial court and the action was dismissed. Plaintiffs are here on writ of error.

"An examination of the record in the two *Davidson* cases, *supra*, discloses that these plaintiffs were intervenors therein in the trial court and were defendants in error in this court.

"It is manifest that the present action is a collateral attack on the final judgments entered in the two cases above referred to.
"*Of necessity there must be an end to litigation between parties to a lawsuit, and those in privity with them,* especially those who are parties to the original action and to the proceedings upon error in this court. *Atchison, Topeka & Santa Fe Railway Co. v. Board of County Commissioners,* 95 *Colo.* 435, 37 P.2d 761."

The *Vessels* case is particularly applicable. While appellants here did not intervene in the prior case, as in *Vessels,* plaintiffs "watched with anxiety" the prior case and likewise should be so bound.

In *Intermill v. Nash,* 94 Utah 271, 75 P. 2d 157 (1938), the opinion discusses at length the matter of collateral attack on judgments. At pages 160, 162, this Court said:

". . . The courts, functioning to determine and settle property rights, upon which persons may rely and the security of society be built, should enjoy, in their formal pronouncements, every possible degree of conclusiveness. To permit their determinations to be lightly regarded or easily evaded would render them nugatory, and be a source of litigation and friction rather than to put an end

thereto. That a litigant may obtain relief against an erroneous or improper judgment, the law has provided for him methods by which he may seek relief therefrom, by appeals to the courts rendering it, or by review in an appellate tribunal; or for matters rendering it invalid, which do not appear in the record, or other proper circumstances, he may ask a court of equity to set aside or annul the judgement. If he does not test the soundness of the judgment by the methods law has provided for that purpose, he cannot question or assail the same for errors in the judgment, or the proceeding in which it was entered when in another proceeding it is pleaded or produced in evidence against him. A judgment, once entered by a court of competent jurisdiction, having the res and the parties duly brought before it as provided by law, imports verity, proves itself, and is invulnerable to attacks by any indirect assaults. It can only be questioned in the manner and the proceedings established by law. And since a judgment is established and proved by the record thereof, unless an inspection of that record establishes its invalidity, shows it to be void, the judgment is conclusive and may not be questioned collaterally by any matters dehors the record thereof."

". . . In an attack on a judgment the only inquiry, in the absence of proper pleadings raising the issue of its validity, the only question that can be inquired into is: Did the court rendering the judgment have jurisdiction to hear and determine the issue, and to render the particular judgment? If that question is answered in the affirmative, the judgment is conclusive in collateral proceedings unless the record thereof affirmately shows

wherein that jurisdiction failed. 9 Am. & Eng. Encyc. of Law, 256; Black on Judgments, Vol 1, par. 256."

The foregoing authorities set forth the basic principle that there must be an end to litigation, a doctrine of estoppel by judgment, which is a specie of or closely related to the principle of res judicata. This is precisely such a case. Property owners in the same zoning district seek to relitigate a judgment based upon a trial on the merits, and defended by a wide range of county officials concerned with land usage and zoning. If the contention of plaintiffs is correct, the litigation can continue indefinitely with repeated retrials of the same basic issues. Whatever the outcome in these proceedings, other property owners in the zoning district could then with equal rights file additional independent actions to destroy the judgment. The practical result of such an interpretation would be to compel anyone bringing a suit such as the *American Housing* case, to join all property owners or those claiming an interest in property in a large zoning district. This, as a practical matter, is utterly impossible, and is obviously not required.

The county officials actively contested the *American Housing* case, it has been litigated in three separate trials or hearings, appealed to this Court, and remitted to the District Court. It is obvious that this proceeding is nothing more than a collateral attack on that judgment and such an attack cannot be made.

Delay in establishment of legal rights can, and usually does, effectively destroy such rights. This is particularly true where, as here, economic competition exists between groups, each seeking to establish a shopping center. Financing normally requires a land title adequate for security purposes. When that title and land usage is the subject of pending litigation, it creates a cloud on title for security as well as other purposes. The merits of the positions of the parties does not solve the matter; it is the fact of litigation alone which is of concern. There should be an end to litigation in these proceedings, based upon the facts as applied to established legal principles.

POINT II

INTERVENORS ARE NOT ESTOPPED TO RESIST THE ATTEMPT OF PLAINTIFFS TO NULLIFY THE AMERICAN HOUSING JUDGMENT, SUPRA, NOR IS THEIR POSITION IN THAT CASE AND THIS CASE INCONSISTENT.

Under Point II of plaintiffs' brief, the argument is advanced that by making the motion to dismiss the *American Housing* appeal, intervenors are now estopped to assert the validity of that judgment, and the District Court should now enter an injunction prohibiting the county officials from performing the acts which they are directed to perform under the judgment and writ of man-

fate. In short, they say, that the judgment directed against the county officials is now void because intervenors moved to dismiss the appeal for mootness.

The contention is without merit, proceeds on basic fallacies, and ignores the basic elements of estoppel.

The judgment and writ of mandate in the *American Housing* case and the attempted injunction in this case are both directed against the county officials and not the intervenors. Theirs are the actions involved, and nothing intervenors can do and no representation or statement of intervenors could change the position of the county officials with reference to the judgment and writ.

Moreover, one who asserts estoppel must have changed position in reliance upon the act or omission to act of another party.

Appellants' brief, page 15, cites 31 C.J.S. 610 which states that estoppel operates when a party assumes a certain position in a legal proceeding, ". . . especially if it is to the prejudice of the party who has acquiesced in the position formerly taken by him." Page 18 of Appellants' brief quotes *IXL Stores Company v. Success Mar-*[illegible], 98 Utah 160, 97 P. 2d 577 (1939), which states:

". . . He who by his language or conduct leads another to do what he would not otherwise have done,

> shall not subject such a person to loss or injury by disappointing the expectations upon which he acted."

Assuming, as it cannot be assumed, that the matter related to the defendant county officials, there is no indication of any change of position on the part of plaintiffs. Plaintiffs do not point out such change, or that they have done any act or failed to do any act they would not otherwise have done as a result of intervenors' moving the Supreme Court for dismissal. They were not and are not parties to that proceeding and could not have acquiesced in or have been misled by the position of intervenors. Furthermore, plaintiffs were not in any way precluded from intervention in the *American Housing* case by any act herein referred to of intervenors.

The cases cited by plaintiffs are not relevant. For example, *Hardgrove v. Bowman,* 10 Wash. 2d 136, 116 P. 2d 336 (1941), involved the claim of appellant for damages on appeal under a contract he had requested the Court to hold invalid, which the Court had done. Here, the actions of intervenors in every instance have been to preserve the judgment, maintain a consistency of position, and not to destroy the mandate. The cited case at page 16 of plaintiffs' brief is to the same type, *Porter v. Oklahoma Bacone College Trust*, 346 P. 2d 328 (Okla. 1959), where the party had stipulated in a Texas probate proceeding that a codicil to a will was void, and in ancillary probate proceedings in Oklahoma contended that it was invalid.

In their entire argument, plaintiffs refuse to examine the judgment and the issues. When this is done, it is clear that the position of intervenors is completely consistent. As noted above, the basic problem in the *American Housing* case, *supra*, is the question as to whether or not applications for building permits to construct a regional shopping center would be cleared from a zoning standpoint for processing by the county officials. The judgment did not direct issuance of the permit, but simply required the county officials to consider and process applications for permits "with reasonable expedition and without consideration of the land and building usage from the standpoint of zoning, and particularly without reference to the use of said buildings and land as a regional shopping center."

At the time of the motion to dismiss, the initial permit had been issued. Such issuance established that the basic issue of the clearance of the shopping center had been made by the zoning administrator or there could have been no consideration of the issuance of any permit. Construction had started, contractual obligations had been entered into, and the parties could not be restored to their original positions. The appeal to the Supreme Court was dismissed, and such dismissal can only be set aside upon the showing of fraud upon the Court, which is neither alleged nor suggested here. It should be noted that fraud has not been pleaded in the complaint herein.

Another basis of plaintiffs' argument is that because the appeal has been dismissed, the judgment suddenly has been dissolved. This obviously is not the case. While the zoning issue has been resolved by the county officials, the intendment of that judgment was to insure the construction of a regional shopping center in its entirety. By its terms, it specifically contemplates that building permits may be required, and as the District Court stated, R-148:

> "The Court: Of course I have just heard this once, but it seems evident to me that the intendment of the order of Judge Erickson, having the problem of a shopping center and zoning problem, was that if the first permit be issued that any other necessary permits in connection therewith also be issued. That would be ridiculous to be litigating every building permit in the shopping center. If you have an appeal on that — I don't thing there is any argument on that. He wasn't making a decision he though would just resolve that first permit. He thought he was solving the whole problem and I think the parties must have though that..."

Although the Building Inspector and other personnel were present in the courtroom at the time of hearing before Judge Anderson (R-117), there was no occasion to call them because the Court disposed of the matter prior to such necessity. However, the situation with regard to the permit was detailed by counsel for intervenors, and the District Court could not have been misled as this statement was made to the Court (R-122):

> "Mr. Worsley: Your Honor, making it crystal clear we will seek quite a substantial number of *supplemental* permits. Now, I think we can resolve this entire matter by simply stating we do not propose, and I hope your Honor hasn't construed anything I have said to indicate that, to be in any way restricted in the completion of this shopping center. Now if additional permits are required, we most certainely will seek them if that answers the qeustion. . . ." (Emphasis added.)

There is nothing inconsistent in seeking supplemental permits in a construction program of the size and complexity of that involved here. When intervenors sought to build a shopping center and received from the county a building permit for construction of only a part of one of the buildings, the footings only, and the permit attached to the motion showed on its face this fact, it was obvious to all concerned that additional processing of construction applications must occur.

If estoppel is involved in any way, it is the plaintiffs who were subject to such rule. They stood by throughout the course of proceedings and made no attempt to intervene or to directly participate as their interests might indicate, until after the judgment was final. Then they stepped forward to advance the theory that the general residential zoning classification of the entire area somehow supersedes the specific judgment rendered after such zoning classification was enacted. While as noted above, such argument is without merit, it could and would have been met during the process of

these proceedings, had it been raised. In this connec
also it must be noted that the validity of such judgm
could have been raised in the order to show cause p
ceeding presented for hearing before the District Co
on May 7, 1965 (the order based theron was entere
July 12, 1965 (R-169) and even in the proceedings for
substitution of parties and the order made therein o
June 1, 1965 (R-172). During all this time, no attem
whatsoever was made by plaintiffs to intervene in th
proceedings and to advance their present theory. I
would appear at this point to be nothing more than an
afterthought in an attempt to set aside, in practical e
fect, the judgment.

POINT III

THE DISTRICT COURT DID NOT ERR IN SUMMARILY DISMISSING PLAINTIFFS' COMPLAINT.

Plaintiff's brief, page 19, complains that plaintiffs did not have any opportunity to present testimony and other evidence. This overlooks the fact that three exhibits were admitted nto evidence, P-1, P-2, and P-4, and that they were offered by plaintiffs. It was these exhibits that were offered by plaintiffs. It was these exhibits that established to the satisfaction of the Court that the issue had been fully determined in a prior action. If plaintiffs had any testimony or other evidence to bring forth, the record is devoid of any offer thereof. A litigant can

really complain that a case is decided against him on the evidence he offers, when he does not offer more, particularly when no complaint was raised in the Trial Court and when the party fully participated in the proceedings before that Court.

At page 21, plaintiffs assert that the District Court based its order dismissing the complaint upon the erroneous conclusion that Doxey-Layton and Building Inspector mistakenly or for some "ill-advised" reason stipulated to the Supreme Court that the writ of mandate had been complied with and that the District Court felt the solution was to force the parties to go back to the Supreme Court and re-open the appeal.

The decision of Judge Anderson was based upon the finality of the *American Housing* case, and his refusal to permit a collateral attack upon that judgment. Many of the authorities on this concept, set forth in Point I of this brief, were presented to the District Court. Moreover, it is clear that the complaint of the plaintiffs before the District Court was that the Supreme Court had been led into error, which is scarcely the case. At R. 149 the statements of counsel and Court make this clear:

> "Mr. McMurray: Our position is that if the Supreme Court has been led into error by what was said here, your Honor, then we shouldn't have to bear the brunt."

> "The Court: Then the remedy is with the Supr Court. They are certainly able to protect th own. If they were deceived or misled or if y have deceived or misled, they have been stro champions to see that no — you can't come ba here with a technical argument saying only o permit has been given and we want to argue ab it. That's what Judge Erickson decided. Th would be going around the circle. Judge Erick decided they could go ahead. That's what he d cided and what you did up there with the Supre Court to follow that up, if that's what it is, i not Judge Erickson's fault nor the fault of t District Court."

The Court also stated (R-148):

> "It was either that dismissal of the appeal f mootness was either ill-advised or *done to pr serve further opportunity to attack* and if don for the latter reason it was a calculated risk and fails at this threshold."

The Trial Court felt that appellants could not co laterally attack the decision in the *American Hous* case, that such case fully decided the issues here, and had before it the undisputed evidence to make such de sion.

SUMMARY

The issues of this controversy were fully resolv in the *American Housing* case. Plaintiffs' contention

stopped does not comply with the basic requirements of such doctrine, and has no application to these proceedings. Plaintiffs in fact seek an improper collateral attack upon the *American Housing* judgment, and there is no legal basis upon which this can be allowed. These matters were fully understood by the Trial Court, and its action in dismissing the complaint was based upon appropriate and applicable law.

The order of the District Court should be affirmed.

Respectfully submitted,

SKEEN, WORSLEY, SNOW
& CHRISTENSEN

Wood R. Worsley and

Joseph J. Palmer

701 Continental Bank Building
Salt Lake City, Utah

Attorneys for Intervenors and
Respondents.